

Question of Whether Firing Was Retaliatory for Requesting Leave

Carolyn D. Richmond and Darren Rumack

Hospitality Law

December 2009

Proper documentation may have helped resort in FMLA lawsuit

A District Court decision highlights the need for employers to be diligent in documenting employee performance issues prior to making an adverse employment decision. In *Markos v. Mount Brighton, Inc.*, No. 08-cv-12588 (E.D. Mich. 08/24/09), the court denied Mount Brighton's motion for summary judgment on Michael Markos' claims of retaliation and interference with his Family and Medical Leave Act rights when he was terminated the same day he requested medical leave due to a knee injury.

Markos worked as the executive chef at the restaurant of the Mount Brighton ski resort starting in March 2004. The parties had contrasting viewpoints of Markos' job performance. Markos presented evidence that he performed quite well as chef, that he was never directed to "do anything differently" as executive chef, and that he was well liked by the customers. Conversely, the employer offered evidence that Markos lied on his employment application, failed to disclose multiple criminal convictions, consistently showed up to work under the influence of alcohol and/or marijuana, and generally performed unsatisfactorily.

In July 2005, Mount Brighton placed a classified advertisement in a newspaper seeking an executive chef, ostensibly to replace Markos. The following day, the resort manager prepared a memo, which was signed by several managers for Markos' personnel file, which stated that Markos had attended a staff meeting under the influence of alcohol. The following week, the manager placed another memo in his file stating that he exhibited a bad attitude at work. Markos claimed that both memos were fabricated, and submitted evidence that two of the managers who signed the memo did not see him intoxicated at the meeting. Further, Markos claimed that the memos were never shown to him and that no disciplinary action was ever taken against him for his alleged wrongful conduct.

In April 2006, Markos injured his knee while attempting to break up a fight between two patrons. The knee injury left him on crutches and in an iron brace, making him unable to stand on his feet all day. However, he agreed to continue to perform his job as executive chef to the best of his ability.

In May 2006, Markos was placed on probation after a manager caught him drinking in a back room on the resort's premises. Later that month, Mount Brighton placed another ad for an

executive chef in a newspaper. In June 2006, the resort hired a replacement chef who would start work in July, with the expectation that Markos' last date of employment would be June 30, 2006.

However, on June 30, 2006, Markos' doctor informed him that he could no longer work due to his knee injury. After presenting proof of his disability to his employer and requesting leave, Markos was terminated that same day. He filed suit for interference with his FMLA rights and also claimed that he was terminated in retaliation for seeking FMLA leave.

Mount Brighton argued that there was no causal connection between his request for medical leave and his termination. However, the court disagreed that the decision to terminate him was made well before he made his request for medical leave. Specifically, the court found that a question of fact existed regarding the connection between his FMLA request and the decision to terminate him, given that both occurred on the same day.

Significantly, the court noted that there were inconsistencies in Mount Brighton's testimony coupled with the fact that Markos was never informed or required to sign any of the disciplinary forms his employer claims he received. As a result, the court denied Mount Brighton's motion for summary judgment on the retaliation claim.

The court also denied the company's motion for summary judgment on the claim of interference, rejecting the claim that Markos would have been terminated irrespective of his request for leave. In particular, the court found it suspicious because Markos' alleged bad conduct had been ongoing for several years, but he was not terminated until the day he sought FMLA leave.